RECORD AND BRIEFS

Nos. 11-338 and 11-347

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR AMICI CURIAE LAW PROFESSORS ON SECTION 1369(b) JURISDICTION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors of environmental and administrative law. *Amici* have a long-standing interest in the proper interpretation of environmental statutes, such as the Clean Water Act ("CWA"). In particular, *Amici* have an interest in ensuring the correct interpretation of the CWA's judicial review and preclusion provision, 33 U.S.C. § 1369(b).

Collectively, *Amici* have spent decades interpreting and teaching the CWA, as well as the other administrative law and statutory interpretation principles at issue in this case. *Amici* believe that many courts have improperly expanded Section 1369(b) beyond its text, and in doing so have created considerable divergence in the case law and confusion for practitioners, conservation organizations, and regulated entities. *Amici* believe the Petitioners' arguments here threaten to further expand the reach of Section 1369(b) well beyond what the statute's text supports, and in contravention of this Court's CWA precedent, as well as jurisprudence regarding as-applied challenges to agency rules and traditional notions of ripeness. At best, *Amici* believe

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[1] In accordance with S. Ct. Rule 37.3(a), all parties have consented to the filing of this brief. All Petitioners and Respondent have done so by filing consent letters directly with the Clerk. Pursuant to S. Ct. Rule 37.6, Counsel for *Amici* states that no counsel for a party authored this brief in whole or in part and no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Petitioners' and the United States' arguments here risk creating even more confusion and tortured procedure for judicial review under one of the nation's most important environmental statutes. The purpose of this submission is to offer support for an interpretation of Section 1369(b) that stays true to the statute's text and avoids the aforementioned problems. A further description of *Amici* is set forth in the Appendix to this brief.

SUMMARY OF THE ARGUMENT

Respondent in this case brought a citizen suit under the CWA based on a simple theory of liability: Petitioners were discharging polluted sediment from point sources into waters of the United States without a National Pollutant Discharge Elimination System ("NPDES") permit, in violation of the statutory prohibition in 33 U.S.C. § 1311(a). This bedrock theory of CWA liability has formed the basis of innumerable citizen enforcement actions for decades. Such an enforcement action is properly brought, as the Respondent did here, in the district court pursuant to 33 U.S.C. § 1365.

Now, having lost in the court of appeals, Petitioners ask this Court to rule that the district court never had jurisdiction in the first place. They argue that Respondent effectively challenged, or the court of appeals effectively invalidated, the U.S. Environmental Protection Agency's ("EPA") rules pertaining to stormwater runoff from certain logging-

related activities. More specifically, they take issue with the Ninth Circuit's conclusion that an NPDES permit is required for pollution from logging roads that is channeled through man-made conveyances because such pollution is not "natural runoff" within the meaning of EPA's "Silvicultural Rule." The Ninth Circuit arrived at this conclusion by both relying on statutory provisions and disagreeing with EPA's interpretation of the regulations at issue. In doing so, Petitioners assert that the Ninth Circuit "implicitly invalidated" the rules. Such a step, according to Petitioners, runs afoul of the limitations set forth in 33 U.S.C. § 1369(b)(2).

But this leap to the preclusion provision of Section 1369(b) is too great for Petitioners' arguments to land intact. The Ninth Circuit's ruling did not run afoul of CWA Section 1369(b) because that provision is simply inapplicable here. For Section 1369(b)(2) to pose any limit on a court's power to interpret or review the validity of a rule, the rule must have been one of the EPA actions directly reviewable exclusively in the courts of appeals under Section 1369(b)(1). As discussed in detail herein, the EPA actions at issue in this case—whether one refers to EPA's Silvicultural Rule, EPA's interpretation of the term "natural runoff" in the Silvicultural Rule, EPA's Phase I stormwater rules, or any other EPA action exempting logging roads from the NPDES program—do not fall within Section 1369(b)(1)'s limited and precise list of actions.

Petitioners make remarkably broad statements regarding the reach of Section 1369(b), suggesting that it requires challenges to all EPA CWA rules be

filed in the courts of appeals. This assertion finds no support in the statute, nor in this Court's rulings in *E. I. du Pont de Nemours & Co. v. Train* ("*E.I. du Pont*"), 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle* ("*Crown Simpson*"), 445 U.S. 193 (1980). While many courts have correctly recognized just how narrow *E.I. du Pont* and *Crown Simpson* are, some courts have gotten side-tracked by one quote from *E.I. du Pont*, in particular, taken out of context. Some case law has then developed around this misstep, with cases relying on each other, often offering little additional analysis, and straying farther from the text of Section 1369. EPA too strayed off course at some point and departed from its early position that "review is not provided for actions in issuing general regulations governing the issuance of NPDES permits," 44 Fed. Reg. 32,854, 32,855 (June 7, 1979), to arrive at its current position that Section 1369 applies to all "NPDES regulations," U.S. Br. 16. Somewhere in all of this, the plain language of the statute has gotten lost.

Petitioners' arguments here threaten to send this runaway evolution of a limited statutory provision off a cliff. Petitioners' arguments pose problems for traditional principles of administrative law and a court's ability to interpret rules, just as this Court has done numerous times under the CWA. What is more, their arguments have untenable practical implications, including opening the courts of appeals to hypothetical challenges to EPA actions unhinged from any facts, or inviting unreviewable *post hoc* agency interpretations of rules. This cannot be what Congress intended.

To be sure, this Court can readily conclude that the regulations at issue are unambiguous or that the Ninth Circuit permissibly interpreted the regulations to bring them in line with the CWA, without reaching any of Petitioners' arguments regarding CWA Section 1369. *See Envtl. Def. v. Duke Energy Corp. ("Duke Energy")*, 549 U.S. 561, 573 (2007); NEDC Br. 19. But if this Court engages in a "jurisdictional" analysis, it should reject Petitioners' invitation to extend Section 1369(b) beyond its textual reach.

ARGUMENT

Section 1369(b)'s text leaves no room for Petitioners' arguments that the district court lacked jurisdiction. The statute plainly does not require that challenges to EPA rules exempting discharges from the NPDES program be brought directly in the courts of appeals.[2] This Court's holdings on Section 1369 are likewise limited. For these reasons, and in light of the troubling implications of an expansive reading of Section 1369(b), Petitioners' arguments should be rejected.

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[2] *Amici* do not endorse the view that EPA promulgated a regulation, or that Respondent challenged such regulation, exempting the relevant discharges from the NPDES program. This brief simply accepts these premises for purposes of arguing that Section 1369(b) does not apply in any event.

I. SECTION 1369(b)(1) DOES NOT APPLY TO THE RULES UNDERLYING THIS CASE

CWA Section 1369(b)(1) is inapplicable to an EPA rule exempting discharges from the NPDES program. Congress expressly enumerated seven EPA Administrator actions[3] subject to Section 1369(b)(1). Section 1369(b)(1) provides for review in the courts of appeals of EPA actions:

> (A) in promulgating any standard of performance under section 1316 of this title,
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title,
> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311,

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[3] Hereafter, we refer to both the EPA Administrator and to the agency itself as "EPA."

> 1312, 1316, or 1345 of this title,
> (F) in issuing or denying any permit under section 1342 of this title, and
> (G) in promulgating any individual control strategy under section 1304(l) of this title . . . .

33 U.S.C. §§ 1369(b)(1)(A)–(G) (2006).

Section 1369(b)(1)'s precision demonstrates that Congress intended Section 1369 to apply *only* to the EPA actions listed therein. As the Second Circuit noted, "the complexity and specificity of [Section 1369](b) in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable." *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976).

Yet in clear contravention of Congressional intent to limit the applicability of Section 1369(b)(1), Petitioners ask this Court to broadly interpret the provision to cover *every* NPDES regulation promulgated by EPA, including regulations exempting discharges from the NPDES program. State Br. 13; Industry Br. 51. Petitioners even go so far as to assert that the courts of appeals must directly hear challenges to the validity of *all* EPA-promulgated CWA regulations. State Br. 32; Industry Br. 52.[4] The text, context, and this Court's

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[4] *See also* Br. for Amicus Curiae Chamber of Commerce of the United States of America in Support of Pet'rs ("Chamber

precedent demonstrate that Section 1369(b)'s coverage extends nowhere near that far and, in any event, does not apply here.

A. The CWA's Grant of Direct Judicial Review to the Courts of Appeals is Limited

Congress listed seven specific EPA actions subject to Section 1369. The statutory text offers no indication that Congress intended the scope of Section 1369 to extend beyond the explicitly listed actions. *See, e.g., Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 188 (1978) (applying the maxim *expressio unius est exclusio alterius* to conclude that Congress did not intend to exempt any "hardship cases" from the Endangered Species Act beyond those expressly listed in the statute). Thus, Congress intended to *exclude* EPA actions not specifically listed in Section 1369. Congress could have included in the CWA a "catch-all" provision for "any other final action of the Administrator," as it did in a similar judicial review provision in the Clean Air Act ("CAA"), 42 U.S.C. § 7607(b)(1), but it did not.[5] Congress's decision not to

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Br.") 3 ("Section 1369(b) provides for review of the lawfulness of EPA's rules"); Br. for Amici Curiae of the States of Arkansas, et al., in Support of the Pet'rs 4 ("Congress allowed judicial review of EPA rules under the CWA when it provided that '[a]ny interested person' may seek review of an EPA action in approving or promulgating any effluent limitation or other limitation.").

[5] The differences between the CAA and the CWA in this regard are particularly important, given all parties' discussions

include such a "catch-all" provision further demonstrates that it intended for the courts of appeals to have direct review over only the actions listed in Section 1369(b)(1).[6]

Recognizing Congress's intent to limit Section 1369(b)(1) to the actions expressly enumerated in the statute, many courts of appeals have correctly interpreted the provision by staying true to its text. *See Friends of the Earth v. EPA*, 333 F.3d 184, 189 (D.C. Cir. 2003) ("We agree with our sister circuits [the 2nd, 5th, 8th, 9th, and 11th Circuits]: original jurisdiction over EPA actions not expressly listed in [S]ection 1369(b)(1) lies not with us, but with the district court."); *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 5 (1st Cir. 2005) ("[S]ince some but not all of the actions that the EPA can take under the CWA are listed with considerable specificity in [S]ection 1369(b), not all EPA actions taken under the CWA are directly reviewable in the courts of appeals.").[7] So

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of this Court's decision in *Duke Energy*. This Court's concern about carefully walking the line between interpretation and invalidation of an EPA regulation was particularly acute in *Duke Energy*, in light of the CAA's sweeping counterpart to CWA Section 1369.

[6] A similar judicial review provision in the Resource Conservation and Recovery Act ("RCRA") also does not include a "catch-all" provision. Courts have interpreted the RCRA provision to include only the actions expressly listed in the statute. *See, e.g., Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996).

[7] *See also Bethlehem Steel Corp.*, 528 F.2d at 517 ("[T]he complexity and specificity of [S]ection 1369(b) in identifying

too should the analysis here start from the premise that *only those EPA actions precisely listed in the 1369(b)(1)* are subject to that provision's limitations on judicial review.

B. A Rule Exempting Discharges from the NPDES Program is Not an "Effluent Limitation or Other Limitation" or the

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what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable. If Congress had so intended, it could have simply provided that all EPA actions under the statute would be subject to review in the courts of appeals, rather than specifying particular actions and leaving out others."); *Am. Iron and Steel Inst. v. EPA*, 543 F.2d 521, 528 (3d Cir. 1976) (referring to Section 1369(b)(1)(E) and (F) as "explicit and limited provisions"); *Appalachian Energy Group v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994) (rejecting original jurisdiction over EPA internal memo in part because Section 1369(b)(1) limits its jurisdiction to "specified actions of the EPA administrator"); *City of Baton Rouge v. EPA*, 620 F.2d 478, 480 (5th Cir. 1976) ("[T]he rule is clear: the Courts of Appeals have jurisdiction for direct review only of those EPA actions specifically enumerated" in Section 1369); *Lake Cumberland Trust, Inc. v. EPA*, 954 F.2d 1219, 1222 (6th Cir. 1992) ("Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the [CWA]." (quoting *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)); *Arkansas Poultry Fed'n v. EPA*, 852 F.2d 324, 325 (8th Cir. 1988) (noting that courts of appeals' original jurisdiction under Section 1369(b)(1)(C) is limited); *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 642 (11th Cir. 1990) (stating that Section 1369 provides for "direct review in a circuit court of appeals of specific administrative actions under the statute").

"Issuance or Denial of a Permit"

Under the plain language of the statute Petitioners' arguments must fail. A rule exempting discharges from the NPDES program is not an "effluent limitation or other limitation" within the meaning of Section 1369(b)(1)(E); nor is it "the issuance or denial of a permit" under Section 1369(b)(1)(F).[8]

1. *Section 1369(b)(1)(E).* A rule exempting discharges from the NPDES program is plainly not an action "approving or promulgating any effluent limitation or other limitation under Section 1311, 1312, 1316, or 1345" of the CWA. 33 U.S.C. § 1369(b)(1)(E). As underscored by the maxim *expressio unius est exclusio alterius,* this Court should interpret Section 1369(b)(1)(E) to apply only to EPA actions taken pursuant to the CWA sections specifically listed therein. The Silvicultural Rule, for example, was not promulgated under any of the CWA sections listed in Section 1369(b)(1)(E); the Federal Register notice of proposed rules for the 1976 version of the Silvicultural Rule notes that the authority for this rule comes from Sections 1314, 1342, and 1361. 41 Fed. Reg. 6,281, 6,283 (Feb. 12, 1976). These statutory provisions are not included within Section 1369(b)(1)(E). Thus, the Silvicultural Rule is not an "effluent limitation or other limitation" for the

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[8] Petitioners contend that only Sections 1369(b)(1)(E) or (F) apply here. Thus Amici will not discuss Sections 1369(b)(1)(A)–(D) or (G).

purposes of Section 1369. *See Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312–13 (9th Cir. 1992) (applying *expressio unius est exclusio alterius* to Section 1369(b)(1)(E) and noting that "[n]o sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated"); *see also Our Children's Earth Found. v. EPA*, 527 F.3d 842, 847 (9th Cir. 2008) (finding Section 1369(b)(1)(E) inapplicable to a challenge to EPAs failure to review effluent guidelines in part because Section 1314(b) is not listed in Section 1369).

Moreover, Congress provided a precise meaning of "effluent limitation" in the CWA, which does not encompass a rule exempting discharges from the NPDES program. Congress defined "effluent limitation" to mean "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . ." 33 U.S.C. § 1362(11) (2006). Congress then authorized EPA to approve or promulgate effluent limitations under several different CWA sections, including Sections 1311(b)(1) and (b)(2)(A) (requiring effluent limitations for existing sources that apply the best practicable control technology ("BPT") by 1977 and best available technology ("BAT") economically achievable by 1989), and Section 1316 (requiring EPA to promulgate new source performance standards applicable to point sources constructed after October 1972). EPA has promulgated scores of such effluent

limitations for myriad industry categories and types of pollutants.[9] Even a quick glance at some EPA actions under these sections confirms that, as one court explained, "[a]s a rule of thumb, effluent limitations dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst. v. EPA*, 890 F.2d 869, 876–77 (7th Cir. 1989) (citations omitted). Rules exempting discharges from the NPDES program do not restrict the "quantities, rates, and concentrations" of pollutants, 33 U.S.C. § 1362(11), and they in no way speak in "technical terms" regarding the "amount of each pollutant" a source may discharge. *Am. Paper Inst.*, 890 F.2d at 876–77. Instead, such regulations *exempt* potential dischargers from any limitations that EPA might otherwise impose through the NPDES program.

A rule exempting discharges from the NPDES requirements is also not an "other limitation" within the meaning of Section 1369(b)(1)(E). As this Court has guided, "where general words follow specific

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[9] *See, e.g.*, 40 C.F.R. § 410.22(a) (2012) (describing BPT effluent limitations for a "pollutant or pollutant property" for wool finishing point sources in terms of pounds per 1,000 pounds of fiber); 40 C.F.R. § 440.43(a) (2012) (describing BAT effluent limitation for "pollutants discharged in mine drainage from mines . . . that produce mercury ores" in terms of milligrams per liter); 40 C.F.R. § 420.14(a)(2) (2012) (describing the new source performance standards for "regulated parameters" such as cyanide and naphthalene resulting from by-product cokemaking in terms of pounds per thousand pounds of product).

words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (applying the maxim *ejusdem generis* to find that the phrase "any other class of workers engaged in . . . commerce" should "be controlled and defined by reference to the [specific classes of workers] recited just before" the phrase) (citations omitted). As the general term "other limitation" follows the more specific term "effluent limitation," other limitation should be understood to mean a limitation akin to an effluent limitation. The Seventh Circuit in *American Paper Institute v. EPA* correctly rejected a broad interpretation of "other limitation" because it "would in effect allow the term 'other limitation' to swallow up distinctions that Congress made between effluent limitations and other types of EPA regulations." 890 F.2d at 876–77.

Moreover, a regulation covered under section 1369(b)(1)(E) must be a *limitation*, regardless of whether it is an "effluent limitation" or an "other limitation." *See Natural Res. Def. Counsel, Inc. v. EPA*, 656 F.2d 768, 775–76 (D.C. Cir. 1981) (finding a regulation to be an "effluent limitation or other limitation" in part because "in practice [the regulations] limit the discharge of sewage"); *see also Virginia Elec. & Power Co. v. Costle*, 566 F.2d 446, 450 (4th Cir. 1977) (construing "limitation" to mean "a restriction on the untrammeled discretion of the industry which was the condition prior to the passage of the statute").

Regulations exempting discharges from the

NPDES program "provide no limitation[] whatsoever" on regulated industries. *Nw. Envtl. Advocates v. EPA ("NWEA")*, 537 F.3d 1006, 1016 (9th Cir. 2008). Nor do they guide or place any restrictions on permit issuers setting the limitations applied to point sources. Thus, these regulations are more akin to those regulations at issue in *American Iron and Steel Institute v. EPA*, where the Third Circuit found that regulations which "do no more than prescribe the policy and procedures to be followed in connection with applications for permits" and "neither prescribe specific number limitations for any pollutant, nor . . . list the factors which must be considered in determining the control measures which individual point sources must employ" were not "effluent limitation[s] or other limitation[s]" under Section 1369. 543 F.2d at 526–27; *see also NWEA*, 537 F.3d at 1016 (noting that EPA's regulation exempting a discharge from the NPDES program could be considered an EPA action "'approving or promulgating any effluent limitation or other limitation' only if those words are understood in a Pickwickian sense"). Here too, EPA's underlying regulations are not effluent limitations or other limitations within the plain meaning of the statute.

2. *Section 1369(b)(1)(F).* Likewise, the text of Section 1369(b)(1)(F) does not include EPA's action exempting discharges from the NPDES program. Section 1369(b)(1)(F) grants the courts of appeals direct review over EPA's action "in issuing or denying any permit under Section 1342" of the CWA. 33 U.S.C. § 1369(b)(1)(F). This provision is plainly about the issuance or denial of a particular NPDES

permit. *See, e.g., Cntl. Hudson Gas & Elec. Corp. v. EPA*, 587 F.2d 549, 557 (2d Cir. 1978) (finding that Section 1369(b)(1)(F) is limited "to a direct challenge to the merits of a decision to 'issue or deny' a NPDES permit"); *Arkansas v. Oklahoma*, 503 U.S. 91, 97 (1992) (assuming without discussion that the court of appeals had original jurisdiction to review EPA's issuance of an NPDES permit). Other provisions within Section 1342 (governing the NPDES permit program) make clear that Congress understood that the regulations fleshing out the stormwater permitting requirements were distinct from the act of issuing or denying any particular permit application. *See* 33 U.S.C. § 1342(p)(4)(A) (2006); *see also* NEDC Br. 25.

EPA's *promulgation of a rule* exempting a category of discharges from the NPDES program can hardly be considered the *issuance or denial* of a particular NPDES permit. This is so even if those words are given a more effects-based gloss. The effect of an exemption from the NPDES program is that dischargers may continue discharging without restriction and without fear of liability under the CWA. EPA's denial of an NPDES permit, on the other hand, means that the denied applicant must stop discharging, or continue discharging without a permit and face CWA civil, and even criminal, liability. *See NWEA*, 537 F.3d at 1018 (finding that permanent exemptions from the NPDES program are not even "functionally similar" to the issuance or denial of an NPDES permit); *Envtl. Prot. Info. Ctr. v. Pacific Lumber Co. ("EPIC")*, 266 F. Supp. 2d 1101, 1113 (N.D. Cal. 2003) (noting that the effect of an

exemption from the NPDES program "is to exclude sources from the NPDES program, whereas the issuance or denial of a permit, as a matter of statutory mandate, only occurs when there are point sources regulated by the NPDES program"). Moreover, Congress expressly included EPA actions approving or promulgating specific regulations in other provisions of Section 1369(b)(1). *See* 33 U.S.C. §§ 1369(b)(1)(A), (C), (E), and (G). If Congress had intended for EPA's promulgation of NPDES regulations to be included in Section 1369(b)(1)(F), it would have expressly said so.[10]

Thus, the EPA actions underlying this case do not fall within the plain language of Section 1369(b)(1)(E) or (F).

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[10] Several district courts have properly reviewed challenges to rules exempting discharges from the NPDES program. *See Natural Res. Def. Counsel, Inc. v. Costle*, 568 F.2d 1369, 1372–73, 1383 (D.C. Cir. 1977) (affirming district court decision holding EPA's categorical exemption for stormwater discharges *ultra vires*); *EPIC*, 266 F.Supp.2d at 1113–20 (concluding that the district court had jurisdiction to review EPA rule exempting silvicultural discharges from the NPDES program); *NWEA*, 537 F.3d at 1010 (affirming district court decision exercising jurisdiction over challenge to EPA rule exempting vessel discharges from the NPDES program); *ONRC Action v. U.S. Bureau of Reclamation*, Civ. No. 97–3090–CL, 2012 WL 3526833, at *24–28 (D. Or. Jan. 17, 2012), *report and recommendation adopted*, No. 1:97–CV–03090–CL, 2012 WL 3526828 (D. Or. Aug. 14, 2012) (holding that district court had jurisdiction over challenge to rule exempting "water transfers" from the NPDES program).

C. Neither *E.I. du Pont* Nor *Crown Simpson* Establishes that Section 1369(b)(1) Extends to EPA Rules Exempting Discharges from the NPDES Program

Petitioners and their amici rely on this Court's decisions in *E.I. du Pont* and *Crown Simpson*. *See, e.g.*, Industry Br. 51; U.S. Br. 22. But those decisions reflect narrow holdings appropriately tailored to a narrow statutory provision.

In *E.I. du Pont*, this Court considered whether Section 1369 provides the courts of appeals with jurisdiction over challenges to "industry-wide regulations imposing . . . precise [effluent] limitations" on existing dischargers. 430 U.S. at 115. This Court's determination that EPA had authority to promulgate effluent limitation regulations under Section 301 "necessarily resolve[d]" the jurisdictional question, because the courts of appeals plainly have jurisdiction over such regulations under Section 1369(b)(1)(E). *Id.* at 136. Once this Court found EPA could promulgate effluent limitations, it looked to the plain meaning of Section 1369 and easily answered the jurisdictional question.

In rejecting the argument that the courts of appeals lacked original jurisdiction, this Court expressed concern that such an interpretation would result in a "truly perverse situation in which the court of appeals would review the numerous individual actions issuing or denying permits pursuant to [Section] 402 but would have no power of direct review of the basic regulations governing those individual actions." *Id.* at 136. The "basic

regulations" this Court was referring to were, of course, the *effluent limitations* at issue in the case. Regulations exempting discharges from the NPDES program are plainly not effluent limitations, as discussed above. And this Court's decision in *E.I. du Pont* should not be expanded beyond its narrow context to support the notion that *all EPA CWA regulations*, or even all NPDES regulations, must therefore be challenged in the courts of appeals.

In *E.I. du Pont* this Court even recognized the probability that certain EPA actions very much resembling the promulgation of effluent limitations would not themselves be subject to review in the courts of appeals under Section 1369. "If industry is correct that the regulations can only be considered [Section 1314] guidelines, suit to review the regulations could probably be brought only in the District Court, if anywhere." *Id.* at 125. This is because Section 1314 is not listed in Section 1369(b)(1). Promulgation of Section 1311 binding effluent limitations and adoption of Section 1314 effluent limitation guidelines are closely related actions.[11] Indeed, the link between effluent

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[11] As noted above, the CWA defines "effluent limitation" as "any restriction . . . on quantities, rates, and concentrations of" pollutants. 33 U.S.C. § 1362(11). In contrast, "effluent limitation guidelines" assist the EPA in determining effluent limitations by, for example, "identify[ing] . . . the degree of effluent reduction attainable through the application of the best practicable control technology available" and "specify[ing] factors to be taken into account in determining the control measures and practices to be applicable to point sources .

limitations and effluent guidelines is far closer than the connection Petitioners have drawn here between the rules at issue in this case and any action listed under Section 1369(b)(1). But, the point is that this Court resisted the notion that even very closely related actions should be swept into Section 1369's coverage.

This Court's decision in *Crown Simpson* is similarly inapplicable here. In *Crown Simpson,* this Court found that the courts of appeals had original jurisdiction under Section 1369(b)(1)(F) over EPA's objection to a state-issued NPDES permit because EPA's objection was "functionally similar" to EPA's denial of an NPDES permit. 445 U.S. at 196. As the Ninth Circuit has recognized, *Crown Simpson* adopted a narrow understanding of "functional similarity," only finding that EPA's objection to a state-issued NPDES permit—which at the time[12] had

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within such categories or classes." 33 U.S.C. §§ 1314(b)(1)(A)–(B) (2006). Thus, EPA's action in "approving or promulgating any effluent limitation" is informed by, but not the same as, EPA's action promulgating regulations providing guidance to the EPA on the setting of effluent limitations. *See, e.g., Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005) (noting that "[t]he specific effluent limitations" at issue in the case "are dictated by the terms of more general 'effluent limitation guidelines'", and that the effluent limitations were "established in accordance with" the effluent limitation guidelines).

[12] Congress later amended the CWA, authorizing EPA to issue a permit itself if a state does not meet the terms of EPA's objections. *See* 33 U.S.C. § 1342(d)(4); *Am. Paper Inst.*, 890 F.2d at 874 ("[W]e believe that the [CWA] amendments to the

the "precise effect" of denying the permit—was "functionally similar" to EPA's denial of a permit. *NWEA*, 537 F.3d at 1016 (citing *Crown Simpson*, 445 U.S. at 196).[13] As the denial of a permit is specifically listed within Section 1369(b)(1), it is wholly unremarkable that the courts of appeals would review such an action. And as discussed above, EPA's action exempting discharges from the NPDES program does not have the "precise effect," or even close to the same effect, as the issuance or denial of an NPDES permit. Thus, *Crown Simpson* is not determinative of the instant case.

This Court in both *E.I. du Pont* and *Crown Simpson* found that the courts of appeals could hear direct challenges only to EPA actions listed in Section 1369 or actions that had the "precise effect" of listed actions. Neither case supports Petitioners' argument that this Court should read Section 1369 to include EPA actions that Congress clearly excluded from the

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FWPCA fundamentally altered the underpinnings of the *Crown Simpson* decision."). The fact that Congress addressed the very quandary this Court was faced with makes *Crown Simpson*'s relevance to this case even more strained.

[13] *See also Nat'l Mining Ass'n v. Jackson*, Nos. 10–1220 (RBW), 11–0295(RWB), 11–0446(RBW), 11–0447(RBW), 2012 WL 3090245, at *10 (D.D.C. July 31, 2012) (finding that EPA's Final guidance was not "functionally similar" to the issuance or denial of an NPDES permit, because even though it "'relates to' the issuance of 402 permits . . . it [did] not amount to an EPA issuance or denial of a 402 permit" (citations omitted)).

scope of the provision. [14]

D. Courts and EPA Have Improperly Departed from the Statute

Despite the unambiguous language of Section 1369(b)(1), Petitioners ask this Court to expand the Section's plain meaning to include EPA's regulations exempting discharges from the NPDES program. Petitioners and their supporting amici rely on a handful of courts of appeals decisions construing Section 1369 as providing them with direct review over not only EPA's issuance or denial of an NPDES permit, but over all NPDES program regulations. *See, e.g., Am. Mining Cong. v. EPA*, 965 F.2d 759, 764 (9th Cir. 1992) (court of appeals had original jurisdiction under Section 1369(b)(1)(F) to review "regulations governing the issuance of permits under [S]ection 402"); *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1296–97 (9th Cir. 1992) (court of appeals had original jurisdiction under 1369(b)(1)(F) to review "rules that regulate the underlying permit procedures"); *Natural Res. Def. Council v. EPA*, 526 F.3d 591, 601 (9th Cir. 2008) (court of appeals had

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[14] Other decisions from this Court counsel against an expansive reading of similar judicial review provisions. *See, e.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring) (expressing concern that a broad reading of the CAA's judicial review provision would raise "constitutional difficulties" because "a failure to seek immediate review will bar affected parties from challenging the [EPA] action in a subsequent criminal prosecution").

original jurisdiction under Section 1369(b)(1)(F) to review EPA rule exempting certain discharges from the NPDES permit requirements); *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 932–33 (6th Cir. 2009) (court of appeals had original jurisdiction under 1369(b)(1)(F) to review EPA rule exempting certain pesticides from the NPDES permit requirements).

Not one of these decisions, however, includes more than a few sentences of analysis of the courts' original jurisdiction under Section 1369. Moreover, these courts have stretched this Court's decision in *E.I. du Pont* well beyond the narrow issue before the Court in that case. For example, the court in *American Mining Congress* misapplied *E.I. du Pont* by taking this Court's admonition against creating a "perverse situation" out of its original context of effluent limitation regulations and applying it to regulations governing NPDES permitting decisions. 965 F.2d at 763. As discussed above, this Court's reference to the "basic regulations" meant the effluent limitations at issue in that case, which were *promulgated via regulation*, not NPDES regulations generally. *E.I. du Pont*, 430 U.S. at 136. The *American Mining Congress* court's misapplication of *E.I. du Pont* forged the above-mentioned chain of case law that has become untethered to the statutory basis of this Court's ruling.[15] *American Mining*

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[15] Other courts began suggesting a broader interpretation of Section 1369 even before this line of cases, though the reach of their analyses was not always clear. For example, in *Natural*

Congress and subsequent courts erred in assuming that *E.I. du Pont* provides them with original jurisdiction over regulations governing NPDES permitting procedures.[16]

EPA too stepped off-track somewhere along the way. In promulgating early NPDES regulations, EPA stated that "review is not provided for actions in issuing general regulations governing the issuance of NPDES permits," but rather that the CWA's review provision applies only to "individual permit issuance actions." 44 Fed. Reg. at 32,855. EPA also explicitly or implicitly took the same position in litigation. Notably, the D.C. Circuit's landmark decision in *Natural Resource Defense Counsel v. Costle,* holding

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Resources Defense Council, Inc. v. EPA, the D.C. Circuit held that Section 1369(b)(1)(E) applied to NPDES regulations that included some provisions "guid[ing] the setting of numerical limitations in 1369." 673 F.2d 400, 402, 404 (D.C. Cir. 1982). To the extent the court believed it had jurisdiction over every regulation included in the 1980 Consolidated Permit Regulations ("CPRs"), it was mistaken. That the courts of appeals might have jurisdiction over challenges to "some of the CPRs", *id.* at 404, does not support the conclusion that the courts of appeals have jurisdiction over challenges to all of the CPRs. The D.C. Circuit also offered no support for its distinction between policy-based rules and substantive rules. *Id.* at 405 & n.15.

[16] Even if this Court were to expand the "perverse situation" concern here, the same dynamic would not exist. An exemption from the NPDES program ensures that the courts of appeals will never be asked to review the grant or denial of a permit.

EPA's categorical exemption for stormwater discharges *ultra vires*, arose from an appeal of a district court decision. *See Natural Res. Def. Counsel, Inc. v. Train*, 396 F.Supp. 1393 (D.D.C. 1975), *aff'd sub nom., Natural Res. Def. Counsel, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In that challenge to EPA's first attempt to exempt silvicultural operations from the NPDES program, EPA did not contest the district court's jurisdiction to hear the case. *See also Am. Iron & Steel Inst.*, 543 F.2d at 524–25 (agreeing with EPA that court of appeals lacked original jurisdiction over Net-Gross Regulations "in the absence of [EPA action] issuing or denying a permit"). It is unclear why EPA changed course, but for all of the reasons above, its earlier interpretation was the correct one.

II. AN EXPANSIVE READING OF SECTION 1369 DISRUPTS THE TRADITIONAL JURISIDCTION FEDERAL COURTS MAINTAIN TO REVIEW AGENCY RULES AS-APPLIED

Petitioners' arguments, if accepted, would improperly limit a court's power to review agency rules and interpretations. Petitioners contend that jurisdiction under the CWA is bifurcated into a world of only two possibilities: one where "parties seeking to challenge the substance of EPA's rules may do so through a rule-review process," and another for "parties seeking enforcement of those regulations [through] citizen-suit provisions." Industry Br. 31–32; *see also* Chamber Br. 2 ("courts sitting to hear

citizen suits enjoy jurisdiction only to enforce EPA's rules, not to invalidate them"); Amicus Curiae Br. of Mountain States Legal Found. in Support of Pet'rs 15–16 ("It is axiomatic that the purpose of citizen suits is to enforce EPA regulations, not to invalidate them."). Not only does this oversimplified picture of the CWA find no support in the statute itself—Section 1369(b) by its plain terms does not apply to all rules (*see supra*)—it also runs counter to this Court's precedent under the CWA and other statutes.

Petitioners' contention that the legality of CWA regulations may only be evaluated in a Section 1369 facial challenge to a rule would mean that this Court has overstepped in several seminal CWA cases. This Court has considered on three occasions, without hesitation, a threshold legal question underlying the issuance of any NPDES permit: the scope of CWA regulations defining waters of the United States. *United States v. Riverside Bayview Homes, Inc.*, 421 U.S. 121, 123 (1985) (considering "adjacent wetlands" under 33 C.F.R. §328.3(a)(7)); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171–72 (2001) (invalidating the Army Corps of Engineers' ("Corps") and EPA's extension of 33 C.F.R. § 328.3(a)(3) "other waters" to include waters based solely on the presence of migratory birds); *Rapanos v. United States*, 547 U.S. 715, 730–31 (2006) (evaluating jurisdiction over wetlands adjacent to tributaries, 33 C.F.R. § 328.3(a)(5) and (a)(7)). These were EPA-issued CWA regulations that did not come to the Court via direct review

under Section 1369.[17] Yet this Court squarely considered the regulations' legality. Under Petitioners' view, presumably this Court lacked the jurisdiction to do so.

Even more recently, this Court evaluated the scope of the CWA regulations governing "fill material" under Section 1344 and the new source performance standards ("NSPS") issued under Section 1316. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council ("Coeur Alaska")*, 557 U.S. 261 (2009). The respondents in *Coeur Alaska* brought suit against the Corps arguing that a CWA permit issued under Section 1344 was not "in accordance with law" because the discharge of mining slurry into a pond was subject to Section 1342. *Id.* at 261. The heart of the respondents' claim was that EPA failed to apply the NSPS regulations, promulgated pursuant to CWA Section 1316(b), to the mining slurry discharge. *Id.* (citing 40 C.F.R. § 440.104(b)(1) (2012)).

Respondent here is pursuing a parallel claim—the application of a Section 1342 regulation, which EPA believes is inapplicable to the discharge at issue. Petitioners' sweeping interpretation of Section 1369 would have barred the Court's decision in *Coeur Alaska*. This is because the respondents there did

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[17] These decisions cite to the Corps regulations, which are identical to the jointly-issued EPA regulations on these issues. *See* 40 C.F.R. § 122.2 (2012) (EPA); 33 C.F.R. § 328.3(a) (2012) (Corps).

not bring a facial challenge to the NSPS regulations, governing "process wastewater" and not exempting "fill material," when the regulations were promulgated in 1982. *See* 47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982).[18] This Court in *Coeur Alaska* explained that it only became clear that Section 1344 could trump the application of Section 1342 years after the NSPS regulations were promulgated.[19] So too here, EPA did not make clear until 2010 that it believed channelized runoff from logging roads fell within the exemption in the Silvicultural Rule. *Joint Appendix Vol. 1*, at 60. Petitioners' view of Section 1369 is therefore inconsistent with the necessity for judicial review that this Court exercised in *Coeur Alaska*.

These decisions highlight an important point. The

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[18] If any lawsuit asserting the applicability of an NPDES regulation was to fall within Section 1369(b)(1), *Coeur Alaska* would have been closer than the case at bar. That is because regulations promulgated under Section 1316 are at least on the list of regulations subject to review under Section 1369(b)(1). *See* 33 U.S.C. § 1369(b)(1)(E) (requiring review of an "Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under Section 1311, 1312, 1316, or 1345 of this title").

[19] Two important events occurred after the 1982 regulations were promulgated. First, EPA and the Corps defined "fill material" using an "effects-based test" in 2002. 67 Fed. Reg. 31,129, 31,132 (May 9, 2002). Second, the agencies analyzed whether mine tailings slurry could be subject to a Section 1344 permit, and clarified the relationship between Sections 1342 and 1344, in the 2004 Regas Memorandum. *Coeur Alaska*, 557 U.S. at 283–87.

right of action to seek immediate, facial review of the validity of certain EPA CWA actions is the *exception* to the otherwise applicable assumption that agency rules may be evaluated on an as-applied basis. The Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, acknowledges this broad scope of review in Section 701(a), where judicial review is granted "except to the extent that–(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." In evaluating statutory preclusion principles, this Court has routinely upheld a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative actions." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (permitting review of an agency action under the Immigration and Nationality Act).[20] In order to rebut this presumption, there must be "clear and convincing evidence" to the contrary. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). A narrow interpretation is consonant with the general presumption of reviewability under the APA and this

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[20] *See also Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 675–78 (1986) (interpreting the Medicare statute to allow an individual to challenge a regulation's validity despite a preclusion on review for individual claims under the statute); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (explaining that when a statute is "reasonably susceptible to divergent interpretation," this Court adopts the reading "that executive determinations generally are subject to judicial review").

Court's previous review of CWA regulations outside the context of Section 1369.

III. PETITIONERS' ARGUMENTS MAKE NO SENSE AS A PRACTICAL MATTER

The practical implications of Petitioners' arguments are troubling, as applied to this case and beyond. Petitioners set up a burden that would have been nearly impossible for Respondent in this case to meet. Moreover, an expansive reading of Section 1369 invites challenges to every EPA CWA action even if not ripe, lest interested parties risk being forever precluded from seeking review. And on the flipside, Petitioners' arguments would permit agencies to develop *post-hoc* interpretations of regulations beyond the 120-day review period, enjoying immunity from suit even if such interpretations are *ultra vires*. This cannot be the result Congress intended.

For starters, if Petitioners are correct, Respondent was required to challenge, *inter alia*, the Silvicultural Rule when the rule was promulgated.[21]

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[21] *See* Industry Pet. for Cert. 29 (arguing "it has been clear since those regulations were promulgated in 1990 that channeled forest road runoff is not a stormwater discharge associated with industrial activity"); Reply Br. Industry Pet. for Cert. 6 ("EPA has repeatedly stated for more than 35 years that forest road precipitation runoff does not become a point source when it is channeled"); Industry Br. 54 ("For 35 years, the meaning of the Silvicultural Rule has been clear: precipitation

Yet, it is inconceivable how Respondent could have been on notice of EPA's interpretation of the rule. Indeed, EPA has acknowledged that it announced its interpretation of the regulation "for the first time" in this very litigation. *Joint Appendix Vol. 1*, at 60.[22] Thus Respondent would have been required to invent the facts surrounding the current controversy.

The implausibility of this scenario is evidenced in the regulatory history. The phrase "natural runoff" crept into the text of the Silvicultural Rule without comment or explanation.[23] The regulatory creep of

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runoff from forest roads, whether or not collected in ditches, is nonpoint source and not subject to permitting. And since its adoption in 1990, EPA's Phase I rule has made clear that collected runoff is not a point source discharge 'associated with industrial activity.' EPA has reiterated these interpretations time and again, and has enforced each consistently from the outset.").

[22] The United States in its 2010 Amicus Brief to the Ninth Circuit argued that Section 1369(b)(1) expressly permitted Respondent's challenge because "the pertinent EPA interpretation [was] offered well after the regulation [was] promulgated." *Joint Appendix Vol. 1*, at 60.

[23] The term "runoff" first appeared in a comment to the EPA's 1978 proposed revision to the 1976 Silvicultural Regulations. 43 Fed. Reg. 37,078, 37,104 (Aug. 21, 1978). The finalized 1980 Silvicultural Rule also included "runoff" it its comment section. 44 Fed. Reg. at 32,914. Without public comment, or EPA elaboration, the term "natural runoff" was adopted into the text of the 1980 regulation. 45 Fed. Reg. 33,290, 33,447 (May 19, 1980). And this rule amendment followed closely on the heels of the D.C. Circuit's seminal decision in *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), which, as explained above, held

the phrase "natural runoff" begs an important question—precisely what could Respondent have challenged at the time of the rule's promulgation if there was no comment or explanation from EPA regarding what "natural runoff" means?[24]

And this argument poses problems well beyond this case. At bottom Petitioners' argument runs afoul of the ripeness doctrine. It is well settled that a party bringing a prospective claim regarding the hypothetical application of a rule to a scenario unimagined by an agency is not ripe for adjudication.

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that EPA did not have the authority to exempt classes of discharges from the CWA. This context makes it even more implausible that Respondent or any other interested party should have read the Silvicultural Rule amendment as an exemption.

[24] Perhaps equally unworkable is the United States' suggestion that Respondent should have directly challenged EPA's interpretation of the Silvicultural Rule announced for the first time in an amicus brief in the proceedings below. U.S. Br. 22–23 n.8 (noting that EPA's clarification in a filing might "provide a new opportunity for review of the rule itself" under Section 1369(b)(1)'s exception for grounds arising after the 120-day limitations period). The questions regarding how such a procedure should unfold are innumerable (*see* NEDC Br. 21–22), and this approach would only exacerbate the procedural confusion at play in the lower courts today, as discussed below. Moreover, the United States' suggestion is troubling, given that Respondent would not have been the only entity interested in the United States' new interpretation of its rule. Yet the Government would apparently hold the general public responsible for knowing what EPA states in every amicus brief it files or else be barred under Section 1369(b) from bringing a later challenge.

The basic premise behind the ripeness doctrine is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148–49.

This Court has categorically held that a party cannot challenge an anticipated agency interpretation. In *Ohio Forestry Ass'n, Inc. v. Sierra Club ("Ohio Forestry")*, the Court found that respondents' claim, challenging a speculative application of a general forestry plan, was not ripe for review. 523 U.S. 726, 728 (1998). Conjuring up future applications of regulations does "not create adverse effects, . . . command anyone to do anything or to refrain from doing anything, . . . grant, withhold, or modify any formal legal license . . . ." *Id.* In short, an imagined application of agency regulations does not create any "legal rights or obligations." *Id.* The logic behind *Ohio Forestry* is simple. Courts are loathe to consider claims that are not ripe because it would require a court to "predict" and anticipate consequences of a regulation that are not present and "may change over time." *Id.* at 736.

Moreover, requiring a party to challenge every potential application of an agency regulation, even before a particular application is understood, opens the floodgates to filings at a court of appeals. As the United States recognized in its brief before the Ninth Circuit, parties would be required to "challenge [any]

potential regulatory interpretations that are textually plausible." *Joint Appendix Vol. 1*, at 60. Though other amici in support of Petitioners raise the specter of legal uncertainty,[25] it is their position that is sure to lead to a litany of litigation and confusion. The world of judicial review of EPA's actions under the CWA is already messy. As one court explained, litigants must "hire a horde of lawyers" to maneuver through the CWA and expend "tremendous resources in time and money and considerable legal skill . . . into finding out the proper address for an appeal." *Longview Fibre Co.*, 980 F.2d at 1314. The confusion in the courts has already led to many litigants filing in both the district court and the court of appeals to protect their claims, then often seeking to stay one litigation and proceed with the other. *See, e.g., Natural Res. Def. Council, Inc.*, 673 F.2d at 402; *NWEA*, 537 F.3d at 1014; *Nat'l Cotton Council*, 553 F.3d at 932; *ONRC Action*, 2012 WL 3526833, at *7–8.[26] A broad interpretation of Section

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[25] *See, e.g.*, Chamber Br. 4 (arguing that the court of appeals' reading of Section 1369 will "subject countless . . . regulated parties to new degrees of legal uncertainty across the entire swath of Code of Federal Regulations provisions").

[26] This recent case highlights tensions in the lower courts today, as a result of expansive and inconsistent interpretations of Section 1369. In *ONRC Action*, the plaintiffs brought an enforcement action against a government agency for discharging without an NPDES permit. 2012 WL 3526833, at *1. Though EPA was not a party to the suit, the district court analyzed EPA's Water Transfers Rule, which would have exempted the government agency's discharge from the NPDES program, to determine whether the rule was consonant with the CWA. *Id.*

1369(b)(1), like the Petitioners advance here, will only exacerbate this problem. *Longview Fibre Co.*, 980 F.2d at 1313. ("[T]he more [courts] pull within [Section 1369(b)(1)], the more arguments will be knocked out by inadvertence later on—and the more reason [law] firms will have to petition for review of everything in sight." (quoting *Am. Paper Inst. v. EPA*, *v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (Easterbrook, J.)). If Section 1369(b) is read to apply to all EPA CWA rules, query what well-counseled regulated entity or conservation organization would allow *any* EPA rule to remain unchallenged in the courts of appeals.

Aside from creating more litigation and needlessly burdening the federal courts, this position is also perplexing in its implications for the regulated community. For example, amicus Chamber of Commerce pleads for an "even field defined by settled rules," but its interpretation obliterates the rights of its own members to protect their interests. Chamber Br. 5. This is because any lawsuit questioning the application of NPDES regulations would be barred 120 days after the regulation's promulgation. The natural consequence of perceiving Section 1369(b)(1) through this looking glass is that Chamber's members would also be barred from challenging *post-*

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at *24–28. The district court found that it had jurisdiction to hear as-applied challenges to the Water Transfers Rule, even though the Eleventh Circuit had exercised jurisdiction over consolidated facial challenges to the Water Transfers Rule, which had been filed directly in the courts of appeals. *Id.* at 8.

hoc agency interpretations of ambiguous regulations, no matter how such an interpretation might affect a particular business. This result was explicitly recognized by amici National Association of Home Builders and National Association of Manufacturers, *et al.* Br. Amici Curiae National Association of Home Builders and National Association of Manufacturers 8–9. Their rather unhelpful solution to this conundrum, however, is only that this Court's ruling can be limited to "the facts of the case at hand." *Id.* at 9. There is no comfort blanket that categorically shields EPA from challenges to newly adopted regulatory meanings, let alone rules that fall outside the enumerated provisions of 1369(b)(1).

Forbidding review of an agency action that has yet to occur would have the pernicious result of allowing "[t]he government . . . to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs." *Wind River Mining Corp. v. United States ("Wind River")*, 946 F.2d 710, 715 (9th Cir. 1991). Judge O'Scannlain's reasoning in *Wind River*, which addresses an analogous problem posed by statutes of limitation, is enlightening.[27] An expansive view of Section 1369 would permit the agency to adopt interpretations of its regulations, after promulgation, that are immune to challenge

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[27] While "statutes of limitations . . . often serve to bar litigation of the merits of otherwise valid legal challenges," these bars are not absolute. *Compare* Chamber Br. 10, *with Wind River*, 946 F.2d at 715–16.

even if they are *ultra vires*.

If this Court reaches the Section 1369(b) issues in this case, the Court should decline Petitioners' invitation to expand the provision beyond the clear, discernible limits set forth in the text itself.

CONCLUSION

For the foregoing reasons, the district court had jurisdiction to hear Respondent's case.

Respectfully submitted,

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